Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77-1026

JANENE RILEY, a minor, by and through DELORES GIBBS, her mother, guardian and next friend,

Appellant,

vs.

STATE OF OHIO, et al.,

Appellees.

On Appeal From The Supreme Court of the State of Ohio

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. ———

JANENE RILEY, a minor, by and through DELORES GIBBS, her mother, guardian and next friend,

Appellant,

vs.

STATE OF OHIO, et al.,

Appellees.

On Appeal From The Supreme Court of the State of Ohio

JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of the Supreme Court of the State of Ohio, entered on October 21, 1977, in a civil tort action brought by the appellant against the State of Ohio, Warren County, Ohio, and various state and county agencies based upon alleged negligence of the state and county which resulted in injuries, on February 22, 1968, including the traumatic amputation of both legs, to the appellant, who was then seven years of age. The appellant was standing off the paved portion of State

Highway 48 in Warren County, Ohio, when she was struck by a school bus which crossed the center line of Route 48 and proceeded southeastwardly off the paving, striking the appellant. The school bus was being operated at the time by one Betty Stephens, an employee of the Warren County Board of Mental Retardation. Stephens was paid and supervised by such Board, and was directed and controlled by that entity.

At issue in this appeal are certain statutes of the State of Ohio, relating to sovereign immunity, which have been held by the courts below to comport with the Constitution of the United States and bar appellant's claims. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions requiring plenary consideration are presented.

OPINIONS BELOW

The Court of Claims of Ohio ruled, on January 18, 1977, that the appellant's action was barred by Section 2743.01 (A), Ohio Revised Code, and that the Act creating the Court of Claims of Ohio is constitutional. The opinion of the Court of Claims is attached hereto as Appendix A.

On appeal, the Court of Appeals of Franklin County, Ohio, affirmed, on July 26, 1977, the judgment of the trial court. The opinion of the Court of Appeals is attached hereto as Appendix B.

Upon an appeal to the Supreme Court of Ohio, that Court entered final judgment, on October 21, 1977, dismissing, without opinion, the appeal from the Court of Appeals for Franklin County. On the same date, the Supreme Court of Ohio entered final judgment overruling

appellant's motion for an Order Directing the Court of Appeals for Franklin County to Certify Its Record. Appellant filed her notice of appeal in the Supreme Court of Ohio on November 7, 1977. She also filed a notice of appeal in the Court of Appeals for the Tenth Appellate District, Franklin County, Ohio, on November 7, 1977, and in the Court of Claims of Ohio on November 14, 1977.

JURISDICTION

This suit was originally brought in the Court of Claims of Ohio alleging that Betty Stephens, acting as an employee and agent and within the scope of her employment and agency for the appellees, negligently operated a school bus into the appellant, causing severe and permanent injuries. The trial court sustained a motion for summary judgment filed by the state appellees. At the same time, a motion to dismiss, filed by the county appellees, was granted by the trial court on the basis of Sections 2743.01, et seq., Ohio Revised Code. The court ruled that Section 2743.2 (A) constitutes a waiver by the State of Ohio of its immunity from liability and is the legislative consent by the State to be sued, and thereby have its liability determined, in the Court of Claims "in accordance with the same rules of law applicable to suits between private parties" subject to certain limitations. The ground on which the motion to dismiss filed by the county appellees was affirmed was Section 2743.01, Ohio Revised Code, which states as follows:

> "(A) 'State' means the State of Ohio, including, without limitations, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions.

"(B) 'Political subdivisions' means municipal corporations, townships, villages, counties, school districts, and all other bodies corporate and politic, not mentioned in division (A) of this section to which the sovereign immunity of the State attaches."

As noted in the opinion of the Court of Claims (Appendix A), appellant asserted at the trial level that the statutes violated her right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States. The opinion of the Court of Appeals of Franklin County (Appendix B) reproduces verbatim the appellant's assignments of error, including the assignment that the statutes in question violated the appellant's equal protection rights.

In the Supreme Court of Ohio, appellant urged the following proposition of law:

"IT WAS ERROR FOR THE TRIAL COURT TO GRANT A MOTION TO DISMISS, FILED BY THE COUNTY DEFENDANTS, WHICH MOTION WAS BASED UPON SECTION 2743.01, ET SEQ., OHIO REVISED CODE, FOR THE REASON THAT THE SAID STATUTES INVIDIOUSLY DISCRIMINATED AGAINST THE APPELLANT IN AREAS OF ACTIVITY IN WHICH THE STATE OF OHIO HAS NO VALID INTEREST IN CREATING DISCRIMINATORY IMMUNITY AND THE SAID STATUTES VIOLATE THE APPELLANT'S GUARANTEE OF DUE PROCESS OF LAW AND DENY THE APPELLANT THE EQUAL PROTECTION OF THE LAWS, AS PROVIDED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 16 OF THE CONSTITUTION OF THE STATE OF OHIO."

The Supreme Court has exclusive jurisdiction to review this decision under 28 U.S.C. Section 1257 (2) because the validity of state statutes has been drawn into question on the grounds that they are repugnant to the United States Constitution, and the highest court of the State of Ohio has delivered its final decision in favor of the statutes' validity. The statutes in issue are set forth verbatim and submitted herewith as Appendix C.

The following cases sustain the jurisdiction of this Court over this appeal:

United States Dept. of Agriculture v. *Moreno*, 413 U.S. 528 (1973)
Sugarman v. *Dougall*, 413 U.S. 634 (1973)
Roe v. *Wade*, 410 U.S. 113 (1973)
James v. *Strange*, 407 U.S. 128 (1972)
Levy v. *Louisiana*, 319 U.S. 68 (1968)
Reed v. *Reed*, 404 U.S. 71 (1971)
Rinaldi v. *Yeager*, 384 U.S. 305 (1966)
Royster Guano Co. v. *Virginia*, 253 U.S. 412 (1920)
Yick Wo v. *Hopkins*, 118 U.S. 356 (1886).

QUESTIONS PRESENTED

1. Whether the Ohio immunity statutes, Section 2743.-01, et seq., are unconstituitonal and void as (a) denying equal protection of the law, and (b) violating the guarantee of due process of law both as provided by the Fourteenth Amendment to the United States Constitution.

2. Whether the Ohio immunity statutes, Section 2743.-01, et seq., are overly broad and violative of the United States Constitution in that they create invidious discrimination in areas of activity where the State of Ohio has no valid interest in creating discriminatory immunity.

STATEMENT OF THE CASE

On November 8, 1976, the appellant filed an amended complaint in the Court of Claims of Ohio, naming as defendants all of the appellees herein. The amended complaint alleged that one Betty Stephens, acting as an employee and agent and within the course and scope of her employment and agency for the appellees, negligently operated a school bus into the person of the appellant, causing severe and permanent injuries.

A motion to dismiss on the ground that the court had no jurisdiction over them was filed by appellees Warren County, Warren County Board of Mental Retardation, and Green Knoll School. A motion for summary judgment was filed by appellees, State of Ohio, Department of Mental Health and Mental Retardation, and the Ohio Department of Rehabilitation and Corrections. The Court noted, with respect to the motion to dismiss, that Section 16 of Article I of the Ohio Constitution, which provides that "Suits may be brought against the state, in such courts and in such manners, as may be provided by law" is not self-executing, and that action by the Ohio Legislature is basic to a prerequisite to the bringing of suits against the state. The General Assembly of Ohio did not authorize suits against the state until it enacted Section 2743.01, et seq., Ohio Revised Code, and created the Court of Claims effective as of January 1, 1975. On the issue raised by the appellant as to the constitutional validity of the Court of Claims Act, the court upheld the constitutionality of the Act, stating that it guaranteed a fair trial to every litigant because "all persons who are in the same category and having a like cause of action or defense have a right to bring or defend lawsuits in such courts."

The Court of Claims granted the motion for summary judgment filed by the state appellees on the grounds that

there was no proof that any state agency was involved in the injuries sustained by the appellant, and there was no proof that any state agency had any direction or control over the bus driver involved in striking the appellant.

The decision of the Court of Claims was appealed in the Court of Appeals of Franklin County, Ohio. That court affirmed the lower court, and rejected the appellant's claim that the Court of Claims Act was unconstitutional. The Court stated:

> "There is no discrimination among plaintiffs or classes of plaintiffs. All have the right to bring actions against the state, but none have the right to bring actions against counties or other political subdivisions of the state."

The Supreme Court of Ohio, in dismissing the appeal from the Court of Appeals of Franklin County, did not issue an opinion.

SUBSTANTIAL FEDERAL QUESTIONS ARE PRESENTED

The United States Constitution, Amendment XIV, states in part:

> "Section 1 . . . no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

In *Reed* v. *Reed*, 404 U.S. 71 (1971), this Court stated:

> "The equal protection clause of the Fourteenth Amendment denies to states the power to legislate that

> different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920)." 404 U.S. 75-76.

This Court considered the question of executive immunity in *Scheuer* v. *Rhodes,* 416 U.S. 232 (1973). *Scheuer* concerned only whether there was absolute immunity governing specific alegations of the complaint against the chief executive officer of a State, the senior and subordinate officers and enlisted personnel of that State's National Guard, and the president of a state-controlled university. 416 U.S. at 242. Previously, this court has considered the immunity of judges from liability for actions undertaken by them in performance of their duties. *Pierson* v. *Ray,* 386 U.S. 547 (1967). The immunity of legislators to be free from arrest or civil process for what they do or say in legislative proceedings was considered and upheld in *Tenny* v. *Brandhove,* 341 U.S. 367 (1951). The Court has not to date, however, considered the precise questions presented by this appeal. At issue here is not the immunity of the executive, but, rather, the immunity of political subdivisions of the state, which immunity has been preserved in the Ohio statutory scheme and upon which the lower courts base their rulings barring the appellant's claims. The result is that the Ohio Court of Claims Act treats one class of injured plaintiffs, those injured by the negligence of employees or agents of political subdivisions of the State of Ohio differently from all other injured plaintiffs, including those plaintiffs injured by the negligent acts of agents or employees of the

State of Ohio, without a substantial governmental interest being advanced.

In *Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972), this Court stated:

> "In all equal protection cases . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by differential treatment."

In addition, the United States Supreme Court, in *Webber* v. *Aetna Cas. & Sur. Co.,* 406 U.S. 164, 176 (1972), stated as follows:

> ". . . the equal protection clause does enable us to strike down discriminatory laws . . . where . . . the classification is justified by no legitimate state interests, compelling or otherwise."

If the appellant in the instant appeal had been struck by a school bus being driven or controlled by a private indivdual or corporation, or by a state-owned or -operated vehicle, she would be able to exercise her right of access to the courts to seek redress for her injuries sustained as the result of alleged negligence by the bus operator. Only because she was struck by a county-owned and -operated vehicle is she barred from exercising this fundamental right.

This court has stated two tests for determining whether a legislative classification violates the equal protection clause. While it has been held that a state is permitted considerably latitude to classify people within its jurisdiction, the classification must bear at least a "reasonable relation" to the purpose of the legislation. *United States Dept. of Agriculture* v. *Moreno,* 413 U.S. 528 (1973); *Sugarman* v. *Dougall,* 413 U.S. 634 (1973); *Roe* v. *Wade,* 410 U.S. 113 (1973); *James* v. *Strange,* 407 U.S. 128 (1972); *Levy* v.

Louisiana, 319 U.S. 68 (1968); *Reed* v. *Reed, supra; Rinaldi* v. *Yaeger,* 384 U.S. 305 (1966); *Royster Guano Co.* v. *Virginia, supra; Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

If the classification is either based on "suspect criteria," such as race, or affects a "fundamental right," a stricter test is applied: there must be a "compelling state interest" or "substantial justification" for creating or enforcing the classification. *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969); *Carrington* v. *Rash,* 380 U.S. 89 (1965); *Baker* v. *Carr,* 369 U.S. 186 (1962).

Appellant submits that under either test, the Ohio Court of Claims Act is repugnant to the Fourteenth Amendment to the United States Constitution. There is absolutely no rational justification whatsoever for retaining the immunity of any political subdivision of State and least of all that of a County. Nor is any legitimate or substantial governmental interest being advanced by a statutory scheme which permits suits in tort against the State or against private indivduals, but not against political subdivisions of State. On the contrary, the statutory scheme has imposed a serious disability on the appellant. This Court has approved the fundamental concept of personal injury law that individuals should be responsible for their wrongdoings. The Court stated, in the context of a discussion on the constitutionality of a statute dealing with illegitimate children:

> "Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Jiminez* v. *Weinberger,* 417 U.S. 628, 632 (1974).

Neither opinion by the courts below in this case constitutes even an attempt to measure the Ohio Court of Claims

Act against either the "rational basis" or "compelling interest" test. The instant appeal does not raise the question urged upon the court in *Krause* v. *State,* 31 Ohio St.2d 132, 285 N.E.2d 736 (1972), appeal dismissed for want of substantial federal questions, 409 U.S. 1052 Rehearing Den., 410 U.S. 918 (1973). That case was decided prior to the effective date of the Court of Claims Act, and since the date of that decision, the legislature has given consent for the State of Ohio to be sued in tort. Section 2743.2 (A), Ohio Revised Code. It does not follow, however, that because a state may validly choose to maintain or waive its governmental immunity, any statutory classification scheme, no matter how arbitrary or irrational, may be imposed in the process. When the State chooses to create statutory classifications allowing redress for some governmental wrongs and denying redress for others, such legislative classifications must conform to the equal protection guarantees of the federal Constitution.

Invidious discrimination offends equal protection guarantees; reasonable classifications of persons are permissible. The discrimination inherent in a particular classification must furnish a proper and reasonable basis for such classification, and the classification cannot be made arbitrarily. In *Rinaldi* v. *Yeager, supra,* the Court stated:

> "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes . . . It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the Constitutional demand is not a demand that a statute necessarily apply equally to all persons . . . Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some

relevance to the purpose for which the classification is made.' . . ." 384 U.S. at 308-09.

The Ohio Court for Claims Act creates two classes of governmental entities: (1) the State of Ohio and (2) all others. It treats the State differently from all other levels of government by making it liable for its negligence "in accordance with the same rules of law applicable to suit between private parties." Section 2743.02 (A). All other levels of government are immune from liability and suit to the extent that the sovereign immunity of the State attaches. Section 2743.01.

These two sections also create, as already noted, two classes of persons. Victims of the tortious conduct of the State are placed in one class; victims of the tortious conduct of all other governmental entities in another. Without question, the statutes are discriminatory. Appellant submits that there are no reasonable justifications or compelling interests for the legislative classifications and the scheme which the Court of Claims Act sets up is, therefore, invidiously discriminatory and offends the constitutional guarantee of equal protection.

It is traditionally argued in support of governmental immunity in general that the interests of the government which may reasonably be conceived to justify the legislative classification are the following: (1) the need to protect the public treasury; (2) the need for the government to be able to function unhampered by the threat of time- and energy-consuming legal action; and (3) the need to protect government in the high-risk activities it performs. Appellant submits that none of these reasons purporting to show the rationality of the statutorally-created classes withstands careful analysis.

Experience does not bear out the fears that have been frequently expressed that the removal of governmental immunity would result in dissipation of public funds, the curtailment or disruption of essential governmental functions, and the forced insolvency of public entities. Since the federal government assumes responsibility for its torts with the enactment of the Federal Tort Claims Act in 1946, it has not suffered financial ruin. A number of states as well as many foreign countries have also adopted comprehensive rules of governmental responsibility in tort without suffering the above-feared consequences. See Blades, *A Comment on Governmental Tort Immunity in Kansas,* 16 Kan. L.R. 265 (1965). Cities have long been subject to varying degrees of liability in tort, yet it has never been shown that adverse tort judgments have forced a city into insolvency proceedings or caused a serious threat to financial stability. David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit,* 6 U.C.L.A. L. Rev. 1 (1959). In the more than 30 years since the doctrine of charitable immunity began its decline, there is no indication in the states abolishing it that donations have diminished, that funds in charitable institutions have been depleted or that the mortality of charitable institutions has increased. *President and Director of Georgetown College* v. *Hughes,* 76 U.S. App. D.C. 123, 130 F.2d 810 (1942). It is further within the constitutional power of the legislature to relieve a public officer, and its sureties, from liability for loss of funds by general tax after such liability has been incurred, or, where the payment of the loss has been made, the legislature is empowered to reimburse the officer or surety from funds raised by general taxation.

The second "interest" which is generally cited as justifying the discriminatory classifications is equally indefensible. To say that the threat of legal actions will intolerably hamper governmental activities is to say that government alone, among all our institutions, cannot properly function

if it shoulders responsibility for its actions. There is little doubt that immunity fosters neglect and breeds irresponsibility, while liability promotes care and caution. Moreover, in view of the waiver of the State's immunity and the consequent necessity for the State to procure insurance to reimburse citizens who are injured as the result of a negligent action of its agents, it can hardly be argued that it is somehow improper or inappropriate to require that a county do likewise.

The third "interest" which is usually proffered as a justification for the preservation of immunity is the need to protect government in high-risk activities which it, of necessity, performs. Experience indicates, however, that absolute immunity in even these high-risk activities, such as law enforcement, is necessary neither for the financial security nor for the proper functioning of government. See, e.g., *Mason* v. *Britton*, 85 Wash.2d 321, 534 P.2d 1360 (1975).

In short, there are simply no reasonable justifications for making a distinction between the classes created by the Ohio Court of Claims Act. An even more basic reason why these attempts at justification fail is the fact that all of the arguments supporting discrimination in favor of the political subdivisions apply equally well to the State. If the treasuries of the political subdivisions need protection, why does the treasury of the State government not need it equally as much? If the political subdivisions must be free from bother of threatened legal actions, how is it that the State can perform its essential public services without the same protection? While many levels of government perform certain "high-risk" activities, why do only the political subdivisions need the complete protection afforded by the statute?

The Court of Claims Act violates the appellant's rights

to equal protection of the law. It also denies her guarantee of due process of law. The concept of due process of law is a central and strategic necessity of our system of jurisprudence. By virtue of that system, citizens are able to govern their individual affairs in an orderly manner and to settle disputes between them in a definitive fashion. It is this concept of due process of law, embodied in the federal Constitution, that guarantees that one will not be arbitrarily deprived of his rights, liberty, or property. If the State is to properly serve the paramount interests of members of society that they be afforded protection against harm to their persons, properties, and characters, it must strive, through its laws, to achieve the goal of protecting the people and of providing them with adequate remedies for injuries wrongfully inflicted upon them. So long as the State fails to do so, it will be functioning in conflict with the public interest and the public good.

There can be no question that governmental immunity, whether it applies to the State or whether its shield is afforded to only political subdivisions of the State, subverts the concept of due process, for that doctrine blocks access to the courts to those seeking redress for injuries occasioned by the negligent act of any governmental entity. An immunity in the legal sense, which avoids liability under all circumstances, is conferred not because of the particular facts of the case, but because of the status or position of the favorite party; it does not deny the tort, but only the resulting liability. W. Prosser, *Law of Torts*, 996 (3d Ed. 1964).

The statutes upon which the appellees' motion to dismiss was based run directly contrary to the basic concept, underlying the entire field of tort law, that liability follows negligence and that individuals and corporations are responsible for the negligent acts of their agents and employees acting

in the course and scope of their employment. Every citizen has a right to be protected by the government in the enjoyment of his life, liberty, and property. To that end, elaborate safeguards are found in the law. Appellant has thus far been deprived of the benefits of those safeguards and will be forever deprived of all rights to redress unless this court reverses the decision of the lower courts and rules that the Ohio Court of Claims Act is unconstitutional.

The concept that a child who loses both legs is entitled to compensation if she is struck by a privately-owned school bus or one operated by the State of Ohio, but is entitled to no compensation when a similar bus is operated by a County is totally repugnant to the Fourteenth Amendment to the Constitution of the United States and represents an arbitrary and unreasonable distinction incompatible with her rights as a citizen of the United States. Can it be validly stated that the class of persons injured by the negligence of private individuals or State employees is, in fact, different from the class of persons injured by the negligence of the County or its employees? Appellant submits that none of the courts which have considered her claim have dealt with the constitutional questions raised by the appellant.

In *Scheuer* v. *Rhodes, supra,* the Court stated, 416 U.S. at 241:

> "Although the development of the general concept of immunity, and the mutations which the underlying rationale has undergone in its application to various positions are not matters of immediate concern here, it is important to note, even at the outset, that one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public."

One of the mutations which the underlying rationale for the general concept of immunity has undergone in its application to various problems is at issue here, and this time there is no public interest requiring decisions and action to enforce laws for the protection of the public which might otherwise serve as a justification for the continued existence of the doctrine. For the reasons stated, appellant respectfully submits that the questions presented in this appeal are so substantial as to require plenary consideration, with brief on the merits and oral argument, for their resolution.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF CLAIMS OF OHIO

CASE NO.: 75-0419

JANENE RILEY (a minor, etc.) et al.,

Plaintiffs,

v.

STATE OF OHIO, et al.,

Defendants.

OPINION

(January 18, 1977)

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Journalized Jan. 18, 1977
By Francis Reeves

JR VOL X PG 167

MOTION TO DISMISS FILED BY WARREN COUNTY, ET AL AND MOTION FOR SUMMARY JUDGMENT FILED BY STATE OF OHIO, ET AL

Plaintiff is a minor who, on February 22, 1968, was standing near a highway in Warren County when she was struck by a school bus and seriously injured thereby. The question as to plaintiff's minority to the tolling of the statute of limitations was previously determined by virtue of R.C. 2305.16, which is controlled by R.C. 2743.16 (A).

In its motion to dismiss, the County agencies contend that this Court has no jurisdiction over them.

The motion for summary judgment filed by the State and its agencies is based upon the basis that reasonable minds can come to but one conclusion and that is adverse to the plaintiff's allegations in her complaint, and this claim should be dismissed because plaintiff fails to prove respondeat superior between defendants and the bus driver.

To the County's motion to dismiss, plaintiff contends that:

1) The Court of Claims Act (R.C. 2743.01 *et seq.*) is unconstitutional because it:
   a) violates due process of law, and
   b) denies equal protection of the law.

2) The defense of sovereign immunity by governmental agencies should not be considered by the courts in this state.

The plaintiff's opposition to the motion for summary judgment is based upon:

1) The theory that funds supplied by the State to the Warren County authorities for the education of retarded children enrolled in the county schools, the State thereby becomes subject to the jurisdiction of this Court, and

2) re-asserts the attack on the validity of the Court of Claims Act.

The legal issues involved in this case have much in common, as they are argued by the litigants in their respective briefs, affidavits, depositions, etc.

We will consider first the question of the defense of sovereign immunity in this state.

In 1912, the voters of this state abolished the defense of sovereign immunity when they approved Section 16 of Article I of the Ohio Constitution, which provides:

"Suits may be brought against the state, in such courts and in such manners, as may be provided by law."

The case of *Raudabagh* v. *State* (1917) 96 Ohio St. 513, clearly stated that:

1) The state is not subject to suits without its express consent, and

2) Section 16, Article I of the Ohio Constitution is not self-executing, and General Assembly action is basic to a prerequisite to the bringing of suits against the state. This principle was reaffirmed in Krause v. State (1972) 31 Ohio St. 2d 132, Syllabbi 1, 2 and 3.

The General Assembly did not authorize suits against the state until it enacted R.C. 2743.01 et seq and made the Court of Claims effective as of January 1, 1975.

In creating the Court of Claims and in delineating the jurisdiction of the Court, the state legislative body defined in 2743.01 (A), "State means the State of Ohio, including without limitation its departments, boards, offices, commissions, agencies, institutions and other instrumentalities. It does not include political subdivisions."

274.01 (B) states, "Political subdivisions" means municipal corporations, townships, villages, counties, school districts and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.

In defining political subdivision as a general provision in state law, the legislature in R.C. 161.03 (E) stated that "political subdivisions" included counties.

It is clear that the sole test utilized by the General Assembly to confer jurisdiction on this Court to consider complaints filed by litigants used geographic dimensions as

a basis. That is, the law clearly states that a state agency is one which has authority anywhere within the boundary confines of the entire state. Any political entity which has a territorial existence of less than the entire state is not subject to being sued in this Court.

Court jurisdictions are governed in their proceedings strictly by statutory enactments and not be (sic) implication. *Beebe* v. *Scheidt* (1862) 13 Ohio St. 406. The powers of courts of special jurisdiction are restricted to the subject matter or territory designated by statute. *Ferris* v. *Higby* (1874) 29 Wall (87 U.S.) 375, 22 L. Ed. 383.

Plaintiff contends that by virtue of appropriations made by the State of Ohio to the Warren County Board of Mental Retardation that such action makes the state and its agencies amenable to this law suit. In 1967, the General Assembly created County Boards of Mental Retardation (R.C. 5126.01 et seq; 132 Ohio Laws 169).

The organization of such county boards, their laws and duties indicates that the Warren County Board, as well as the other similar boards created throughout the state, are county agencies appointed by the Board of County Commissioners with jurisdiction solely within their own county. There is no authority for such board to act outside of the territorial limitation of their own county. Whatever funds are appropriated by the State to such boards show there is no state involvement in each county's exercise of powers and duties conferred upon it by R.C. 5126.03.

While the county boards may be subject to rules, regulations and standards of the Chief of the Division of Mental Retardation and Developmental Disabilities as R.C. 5126.03 was amended in 1972, employment and supervision of personnel remains with the county board as well

as operating the facilities, carrying out the programs, etc., remain with the county having solely local jurisdiction.

We can find no basis in the act creating the board which gives such agency state-wide jurisdiction which would make it subject to the jurisdiction of this Court.

Even if it be argued that the county board is a state agency, there is nothing in the record to indicate that the state had any superintendence or control over Betty Stephens in the performance of her bus driving responsibilities as required by *Clark* v. *Fry* (1853) Ohio St. 358, 378, 379. In the absence of such proof, there can be no liability on the part of the State or any of its agencies. This principle of law reaffirmed in *Ward* v. *Barrington,* (1931) 123 Ohio St. 565, 568, *Klar* v. *Erie R.R. Co.,* (1928) 118 Ohio St. 612, Syllabus 2, and *Babbit* v. *Say,* (1929) 120 Ohio St. 117, Syllabus 3.

The fact that the County Board may have taken out liability insurance on its motor equipment does not confer Jurisdiction of this Court of any of the defendants. There is nothing stated in R.C. 5126.05 which gives the County Board authority to procure policies of liability insurance from the performance of their official duties. There is no showing that the statute states that the procurement of such policies confers jurisdiction on this Court to hear and determine such cases. Even if this statute did so state, it could not be of effect on this case because R.C. 5126.05 did not become effective until November 14, 1975. The sole purpose of this statute is that if the board decides to take out such insurance coverage, it may expend public funds to do so. In 1962, OAG 3512, the Attorney General held that the procurement of liability insurance by county authorities under R.C. 307.44 does not waive the county's governmental immunity from suit in fact.

We now come to consider the question of the constitutional validity of the Court of Claims Act. Plaintiff claims that if she was injured by a privately owned motor vehicle, she could sue for damages, or if the public agency which owned and operated the bus was clearly a state agency, she could sue, but the Court of Claims in denying her the right to sue violates due process and equal protection of the law. We disagree.

The Court's analysis of the applicable law finds that the General Assembly in following Constitutional mandates to create courts is not to deprive any person due process of law or deny such individual the equal protection of the laws. However, in creating courts, for example, and conferring upon them jurisdiction of persons and subject matter, it may classify persons who may litigate in this Court, the subject matter of the litigation to be considered by the Court, the territorial jurisdiction of the Court, etc. This is particularly true in courts such as this Court; though this is a court of record, it is not a court created by constitutional mandate. The litmus test to guarantee a fair trial to every litigant is that all persons who are in the same category and having a like cause of action or defense have a right to bring or defend law suits in such courts. *Allen* v. *Smith,* (1911) 84 Ohio St. 283, 291, 95 N.E. 829. This principle of law was re-affirmed in *State ex rel* v. *Growth Corp.,* (1966) 7 Ohio St. 2d 34.

The General Assembly in creating this Court gave the consent of the State to be sued solely by persons seeking damages against state agencies in the performance of state duties or business.

We therefore hold in this case that:

1) The State of Ohio or any of its agencies cannot be sued in this Court because:

a) there is no proof that any state agency is involved in the injury sustained by plaintiff;

b) there is no proof that any state agency had any direction or control over the bus driver involved in striking the plaintiff.

2) The County of Warren or any of its names (sic) agencies cannot be sued in this Court because:

a) the activity of the bus in question was engaged solely in County business and by virtue of *Schaffer* v. *Roand,* (1960) 171 Ohio St. 228, a county or its agencies are immune from suit for negligence;

b) under R.C. 2743.01 (A) , the Court of Claims has no jurisdiction over a county or any of its agencies.

3) The Act creating the Court of Claims of Ohio is constitutional.

The motion to dismiss and the motion for summary judgment are sustained.

Judgment is entered for each defendant. Cause dismissed at plaintiff's costs.

/s/ LEONARD J. STERN
Judge

APPENDIX B

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

No. 77AP-115

JANENE RILEY, BY AND THROUGH
DELORES GIBBS, HER MOTHER,
GUARDIAN, AND NEXT FRIEND,

AND

DELORES GIBBS, ET AL.,
Plaintiffs-Appellants,

vs.

STATE OF OHIO, c/o WILLIAM J. BROWN,

AND

DEPARTMENT OF MENTAL HEALTH &
MENTAL RETARDATION, ET AL.,
Defendants-Appellees.

DECISION

Rendered on July 26, 1977

LINDHORST & DREIDAME,
MR. LEO J. BRESLIN, of Counsel,
1220 American Building,
Cincinnati, Ohio 45202,
For Plaintiffs-Appellants.

MR. WILLIAM J. BROWN,
Attorney General,

MR. THOMAS E. TURK, Assistant,
State Office Tower, 17th Floor,
30 East Broad Street,
Columbus, Ohio 43215,
For Defendants-Appellees State of Ohio and Department of Mental Health & Mental Retardation.

MR. MORRIS J. TURKELSON and
MR. EDWARD J. CRANMER,
77 South Main Street, Box 656,
Waynesville, Ohio 45068,
For Defendants-Appellees Warren County, and Warren County Board of Mental Retardation, and Green Knoll School.

REILLY, J.

This is an appeal from a judgment of the Court of Claims of The State of Ohio. The notice of appeal reads as follows:

> "Notice is hereby given that plaintiffs hereby appeal to the Court of Appeals, Franklin County, Ohio, Tenth Appellate District, from the judgment sustaining the motion to dismiss filed by Warren County and its agencies, sustaining the motion for summary judgment by the State of Ohio and its agencies, entering judgment for each designated defendant and dismissing the cause at plaintiff's costs, which judgment became final on January 18, 1977."

The record shows that February 22, 1968, Betty Stephens was driving a 1967 International bus during the scope of

her employment as a bus driver, responsible for transporting mentally retarded children to and from Green Knoll School. Shortly before 3 p.m. that day, this bus struck Janene Riley, who was standing along the side of the highway which was Route 48 just north of Maineville, Ohio. This was undoubtedly a major tragedy because Janene Riley suffered amputation of both her legs and other injuries. She was seven years old at the time and the prayer was for two million dollars.

Counsel for appellant submitted a memorandum and several supporting affidavits in opposition to the motion for summary judgment. Appellant contended that the state was involved with Betty Stephens' employment; that, although the actual hiring and supervision of employees was a responsibility of the county, the latter was required to follow the state's standards (R. C. 5126.03); and that, although Betty Stephens' paycheck was from Warren County, the funds were provided by the state, with the county acting as a conduit. Moreover, appellants claim that the state retains supervisory powers over the education of the retarded. The school busses were maintained in accordance with state standards; and bus drivers hired by the county were required to pass physical and mental examinations administered by the state. Finally, appellant contends that governmental immunity was waived due to the legislative authorization of the purchase of liability insurance, and that Warren County had purchased such liability insurance. (Note R. C. 307.44.) Notwithstanding, the Court of Claims, in its decision, held that it was a court of special jurisdiction, restricted by statute. Further, the court noted R. C. 5126.01 *et seq*. created county boards of mental retardation but did not find that such statute granted such agency statewide jurisdiction, making it subject to a suit in the Court of Claims. Further, the court found that, even if such jurisdiction existed, there was no proof in the

present case that the state had any control over Betty Stephens in performing her bus driving duties.

Whereupon, appellant has perfected this appeal, including the following assignments of error:

"1. The Court erred in granting the motion to dismiss of defendants, Warren County, Warren County Board of Mental Retardation and Green Knoll School, where the movants did not conclusively establish that the plaintiff could prevail on her complaint under no set of facts.

"2. The Court erred in granting a summary judgment for defendants, State of Ohio, Department of Mental Health and Mental Retardation, and Department of Rehabilitation and Corrections, wherein the evidence before the Court regarding the control exercised by the State defendants over the County defendants and their employees, presented a genuine issue as to the material fact of the liability of the State defendants, by virtue of this involvement, for the negligence of the individual who operated the school bus which struck the minor plaintiff.

"3. That the Court erred in holding that the Act creating the Court of Claims of Ohio is constitutional where the Act creates an invidious discrimination as to plaintiff in areas of activity where the State of Ohio has no valid interest in creating discriminatory immunity, and where Section 2743.01, et seq., Ohio Revised Code, violates the plaintiff's guarantee of due process of law and denies the plaintiff the equal protection of law, as provided by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Constitution of the State of Ohio.

"4. The Court erred in holding that the State of Ohio or its agencies cannot be sued in the Court of Claims of Ohio where the Court's holding is based

upon an Act of the Legislature which creates an invidious discrimination as to plaintiff in areas of activity where the State of Ohio has no valid interest in creating discriminatory immunity, and where Section 2743.01, et seq., Ohio Revised Code, violates the plaintiff's guarantee of due process of law and denies the plaintiff the equal protection of the law, as provided by the Fourteenth Amendment to the United States Constitution of the State of Ohio.

"5. The Court erred in holding that the County of Warren or any of its named agencies cannot be sued in the Court of Claims of Ohio where the Court's holding is based upon an Act of the Legislature which creates an invidious discrimination as to plaintiff in areas of activity where the State of Ohio has no valid interest in creating discriminatory immunity, and where Section 2743.01, et seq., Ohio Revised Code, violates the plaintiff's guarantee of due process of law and denies the plaintiff the equal protection of the law, as provided by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Constitution of the State of Ohio."

The trial court properly dismissed appellants Warren County Board of Mental Retardation and Green Knoll School. The record shows that appellants are jurisdictions of county government created by R. C. 5126. R. C. 2743.-01 (A) excludes political subdivisions from the definition of state as used in the Court of Claims Act, and R. C. 2743.01 (B) defines political subdivisions, which includes the foregoing appellants. The Court of Claims Act waives only the state's sovereign immunity and does not waive sovereign immunity of other political subdivisions. Therefore, the trial court properly dismissed appellants Warren County Board of Mental Retardation and Green Knoll

School because appellant could not prevail against the above defendants in this case. Hence, appellant's first assignment of error is overruled.

Appellant's second assignment of error is also not well taken. The record does not disclose that there was direct control by any state agency over the bus driver involved. There is no doubt that the bus driver was hired by the Warren County Board of Mental Retardation; paid and supervised by such board; and was directed and controlled by that entity. The fact that this school bus, like all school buses in Ohio, must be inspected by the Department of Highways, and that the Warren County Board of Mental Retardation obtained liability insurance covering the bus driver, is not pertinent to the issue of whether a state agency can be held liable for the acts of the bus driver involved in this case. R. C. 307.44 permits the purchase of insurance covering officers and employees, not the governmental entity itself. R. C. 3327.09 permits the purchase of accident insurance covering pupils, and not liability insurance insuring the entity. R. C. 5126.05 provides for insurance coverage for board members or employees, but not the county or the entity itself. Moreover, R. C. 3327.10 implies supervision by the county board or entity which has hired the driver, not the State of Ohio. None of the statutes noted by appellant in the brief authorize liability coverage for the county entity involved. Such statutes provide coverage for the officers or employees of the county, rather than the county.

Furthermore, the record, along with the applicable statutes, does not establish the existence of a principal agent or master-servant relationship between these appellees and the driver of the school bus in this case. Therefore, the trial court correctly granted appellees' motion for summary judgment and dismissed appellant's complaint. The second assignment of error is overruled.

Appellant's third, fourth and fifth assignments of error involve the constitutionality of the Court of Claims Act. The Constitution of the State of Ohio, Article I, Section 16, includes the following:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.
>
> "[Suits against the state.] Suits may be brought against the State, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)"

Before the enactment of the Court of Claims Act, the State of Ohio was immune from suit. (*Wilson* v. *Cincinnati* [1961], 172 Ohio St. 303; *Wolf* v. *Ohio State University Hospital* [1959], 170 Ohio St. 49.) Thus, Article I, Section 16, is not self-executing, and suit may not be brought without statutory authorization against the State of Ohio. The state expressly waived sovereign immunity in actions against the state itself, but not against counties or other political subdivisions. There is no express statutory consent for suits against a county or its agents. A county and its agencies are immune from suit in the absence of statutory authorization. The General Assembly was granted authority to waive sovereign immunity. It chose to waive that immunity only as it applies to the state, and retain it as to other political subdivisions.

There is no discrimination among plaintiffs or classes of plaintiffs. All have the right to bring actions against the state, but none have the right to bring actions against counties or other political subdivisions of the state. The Supreme Court of Ohio has dealt with the question of sovereign immunity, along with Article I, Section 16, of the Ohio Constitution, in *Krause, Admr.* v. *State* (1972),

31 Ohio St. 2d 132, the first four paragraphs of the syllabus of which are as follows:

"1. The state of Ohio is not subject to suits in tort in the courts of this state without the consent of the General Assembly. (*Raudabaugh* v. *State,* 96 Ohio St. 513; *Palumbo* v. *Indus. Comm.,* 140 Ohio St. 54; *State, ex rel. Williams,* v. *Glander,* 148 Ohio St. 188; and *Wolf* v. *Ohio State Univ. Hospital,* 170 Ohio St. 49, approved and followed.)

"2. Section 16 of Article I of the Ohio Constitution, as amended September 3, 1912, abolished the defense of governmental immunity and empowered the General Assembly to decide in what courts and in what manner suits may be brought against the state.

"3. Section 16 of Article I of the Ohio Constitution, as amended September 3, 1912, which provides that '* * * Suits may be brought against the state in such courts and in such manner, as may be provided by law,' is not self-executing, and statutory consent is a prerequisite to such suit. (*Raudabaugh, Palumbo, Williams* and *Wolf, supra,* approved and followed.)

"4. Section 16 of Article I of the Ohio Constitution does not offend the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."

Whereupon, considering Article I, Section 16, of the Ohio Constitution, and a legislative enactment which limts the immunity of the state and retains sovereign immunity for counties and other political subdivisions of the state, it is plainly constitutional. The Court of Claims Act preserves sovereign immunity for counties and other political subdivisions. Furthermore, the record does not show a

principal agent or master-servant relationship which could result in a liability in the state or any of its agencies for the most tragic injuries which appellant sustained. Therefore, appellant's third, fourth and fifth assignments of error are not well taken and are overruled.

Whereupon, for the foregoing reasons, the judgment of the trial court is affirmed.

WHITESIDE and McCORMAC, JJ., concur.

APPENDIX C

OHIO REVISED CODE

§ 2743.01 [Definitions]

As used in Chapter 2743. of the Revised Code:

(A) "State" means the state of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions.

(B) "Political subdivisions" means municipal corporations, townships, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.

(C) "Claim for an award of reparations" or "claim" means a claim for an award of reparations made under sections 2743.51 to 2743.72 of the Revised Code.

(D) "Award of reparations" or "award" means an award made under sections 2743.51 to 2743.72 of the Revised Code.

§ 2743.02 [State waives immunity from liability.]

(A) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. To the extent that the state has previously consented to be sued, this chapter has no applicability.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This chapter is also applicable to hospitals owned or operated by political subdivisions which have been determined by the supreme court to be subject to suit prior to the effective date of this section.

(C) Any hospital, as defined under section 2305.11 of the Revised Code, may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees and, whether or not such insurance is purchased, may, to such extent as its governing board considers appropriate, indemnify or agree to indemnify and hold harmless any such person against expense, including attorneys' fee, damage, loss or other liability arising out of, or claimed to have arisen out of, the death, disease or injury of any person as a result of the negligence, malpractice, or other action or inaction of such indemnified person while acting within the scope of his or her duties or engaged in activities at the request or direction, or for the benefit, of the hospital. Any hospital electing to indemnify such persons, or to agree to so indemnify, shall reserve such funds as are necessary, in the exercise of sound and prudent actuarial judgment, to cover such potential expense, fees, damage, loss, or other liability. The superintendent of insurance may recommend, or if such hospital requests of the superintendent of insurance shall recommend, a specific amount for any given period of time that in his opinion represents such a judgment. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Judgments under sections 2743.01 to 2743.20 of the Revised Code against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery by the claimant.

APPENDIX D

IN THE COURT OF CLAIMS OF OHIO

CASE NO. 75-0419

JANENE RILEY, (a minor, etc.) et al.,
Plaintiffs,

vs.

STATE OF OHIO, et al.,
Defendants.

ORDER
(January 18, 1977)

IT IS ORDERED THAT:

1) The motion to dismiss filed by Warren County and its agencies is sustained;

2) The motion for summary judgment by the State of Ohio and its agencies is sustained;

3) Judgment entered for each designated defendant;

4) Cause dismissed at plaintiff's costs.

/s/ LEONARD J. STERN
Judge

JOURNALIZED Jan. 18, 1977
/s/ FRANCIS REEVES

JR VOL X PG 175

APPENDIX E

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

No. 77AP-115

JANENE RILEY, ETC., ET AL.,
Plaintiffs-Appellants,

v.

STATE OF OHIO,
c/o WILLIAM BROWN, ET AL.,
Defendants-Appellees.

JOURNAL ENTRY OF JUDGMENT
(Filed July 27, 1977)

For reasons stated in the decision of this court rendered herein on July 26, 1977, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Court of Claims of Ohio is affirmed.

WHITESIDE, REILLY and
McCORMAC, JJ.

By /s/ ARCHER E. REILLY,
Judge

cc: Leo J. Breslin
Thomas E. Turk
Morris J. Turkelson

APPENDIX F

IN THE SUPREME COURT OF OHIO

Case No. 77-1007

JANENE RILEY, a minor, by and through DELORES GIBBS, her mother, guardian and next friend,
Plaintiff-Appellant.

vs.

STATE OF OHIO,
DEPARTMENT OF MENTAL HEALTH & MENTAL RETARDATION,
DEPARTMENT OF REHABILITATION AND CORRECTIONS,
WARREN COUNTY,
WARREN COUNTY BOARD OF MENTAL RETARDATION,

and

GREEN KNOLL SCHOOL,
Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed November 7, 1977)

Notice is hereby given that Janene Riley, a minor, by and through Delores Gibbs, her mother, guardian and next

friend, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment dismissing the appeal from the Court of Appeals for Franklin County and entered in this action on October 21, 1977, and from the final judgment overruling appellant's Motion for an Order Directing the Court of Appeals for Franklin County to Certify Its Record, also entered in this action on October 21, 1977.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

LEO J. BRESLIN
LINDHORST & DREIDAME
Attorneys for Plaintiff-Appellant
1200 American Building
Cincinnati, Ohio 45202

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX G

COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

Case No. 77AP-115

JANENE RILEY, a minor, by and through DELORES GIBBS, her mother, guardian and next friend,
Plaintiff-Appellant,

vs.

STATE OF OHIO,
DEPARTMENT OF MENTAL HEALTH & MENTAL RETARDATION,
DEPARTMENT OF REHABILITATION AND CORRECTIONS,
WARREN COUNTY,
WARREN COUNTY BOARD OF MENTAL RETARDATION,
and
GREEN KNOLL SCHOOL,
Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed November 7, 1977)

Notice is hereby given that Janene Riley, a minor, by and through Delores Gibbs, her mother, guardian and

next friend, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Ohio dismissing the appeal from the Court of Appeals for Franklin County, entered in this action on October 21, 1977, and from the final judgment of the Supreme Court of the State of Ohio overruling the appellants Motion for an Order Directing the Court of Appeals for Franklin County to Certify Its Record, also entered in this action on October 21, 1977.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

LEO J. BRESLIN
LINDHORST & DREIDAME
Attorneys for Plaintiff-Appellant
1200 American Building
Cincinnati, Ohio 45202

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX H

IN THE COURT OF CLAIMS
STATE OF OHIO

Case No. 75-0419

JANENE RILEY, a minor, by and through
DELORES GIBBS, her mother, guardian and next friend,
Plaintiff-Appellant,

vs.

STATE OF OHIO,
DEPARTMENT OF MENTAL HEALTH &
MENTAL RETARDATION,

DEPARTMENT OF REHABILITATION AND
CORRECTIONS,

WARREN COUNTY,

WARREN COUNTY BOARD OF MENTAL
RETARDATION,

and

GREEN KNOLL SCHOOL,
Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed November 14, 1977)

Notice is hereby given that Janene Riley, a minor, by and through Delores Gibbs, her mother, guardian and next friend, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment dismissing the appeal from the Court of Appeals for Franklin County and entered in this action on October 21, 1977, and from the final judgment overruling appellant's Motion For an Order Directing the Court of Appeals for Franklin County to Certify Its Record, also entered in this action on October 21, 1977.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

.....

LEO J. BRESLIN
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Attorneys for Plaintiff-Appellant
1200 American Building
Cincinnati, Ohio 45202
(513) 421-6630

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX I

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) To wit: October 21, 1977
City of Columbus.) 1977 TERM

No. 77-1007

JANENE RILEY, a Minor et al.,
Appellants,

vs.

STATE OF OHIO et al.,
Appellees.

APPEAL FROM THE COURT OF APPEALS FOR FRANKLIN COUNTY

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

[DULY CERTIFIED]

APPENDIX J

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,) 1977 TERM
City of Columbus.) To wit: October 21, 1977

No. 77-1007

JANENE RILEY, a Minor et al.,
Appellants,

vs.

STATE OF OHIO et al.,
Appellees.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

(Filed November 4, 1977)

It is ordered by the Court that this motion is overruled.

COSTS:
Motion Fee, $20.00, paid by Lindhorst & Dreidame.

[DULY CERTIFIED]

Supreme Court, U. S.
FILED
MAR 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. 77-1026

JANENE RILEY, a minor, by and through DELORES GIBBS, her mother, guardian and next friend,

Appellant,

vs.

STATE OF OHIO, et al.,

Appellees

On Appeal From The
Supreme Court of the State of Ohio

MOTION TO DISMISS OR AFFIRM

WILLIAM J. BROWN
Attorney General of Ohio

THOMAS E, TURK
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977

No. 77-1026

JANENE RILEY, a minor, by and through DELORES GIBBS, her mother, guardian and next friend,

Appellant,

vs.

STATE OF OHIO, et al.,

Appellees

On Appeal From The
Supreme Court of the State of Ohio

MOTION TO DISMISS OR AFFIRM

The Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Ohio on the ground that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of certain provisions of the Ohio "Court of Claims Act" (Ohio Revised Code Section 2743.01 et seq, 1975).

This statute provides a waiver of the State's immunity from liability and a consent by the State to be sued, and have its liability determined, in the Ohio Court of Claims, created by the statute in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in the statute. The statute specifically excludes political subdivisions, including counties, from "state" as used in the statute thus excluding those political subdivisions from the waiver of immunity from liability and consent to suit. The statute therefore leaves the lesser political subdivisions of the State in the same position they enjoyed prior to the enactment of the Ohio "Court of Claims" Act.

B. The Proceedings Below

Appellant was injured by an employee of Warren County, Ohio and brought suit in the Court of Claims of Ohio against the State of Ohio and Warren County. Appellants' Complaint was dismissed and the Court of Claims Act including the provisions excluding lesser political subdivisions, including counties, from the waiver of immunity and consent to suit were held valid by the Ohio Court of Claims. The 10th District Court of Appeals of Ohio affirmed the Court of Claims and Appellants' Motion to Certify the Record below in the Supreme Court of Ohio was overruled.

II.
ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

Since the case of *Palmer v. Ohio,* 248 U.S. 32 (1918), it has been well settled that the question of state governmental immunity is not one for review by this Court. That case established that the right of individuals to sue a State cannot be derived from the Constitution or laws of the United States but can only come from the consent of the State and is a question of local state law as to which the decision of the State Supreme Court is controlling, no federal right being involved. The Ohio "Court of Claims Act" (O.R.C. 2743.01 et seq) does not create classes of plaintiffs, it simply recognizes different and distinct classes of governmental subdivisions which have existed within Ohio since it achieved statehood. That lesser political subdivisions within the State, such as counties, are fundamentally different in both form and substance from the State itself is obvious. The tax base and means of raising revenue of political subdivisions differs greatly from that of the State. Some political subdivisions, including counties, have absolutely no legislative powers. Yet counties operate independently through locally elected officials who are not directly controlled by the State. A county's area of activity is different than that of the State as is its delineation of authority.

It is settled that equal protection does not require that all inconsistencies be eliminated. The Constitution does not require that things which are different be treated as if they were the same. *Tigner v. Texas,* 310 U.S. 141 (1940). In considering an "Equal Protection Argument" in relation to certain limited waivers of the immunity of some political subdivisions, the Supreme Court of Ohio found that substantive differences existed between the State and its political subdivisions:

> "Assuming that such observation refers to municipalities, or other political subdivisions, there are sufficient substantive differences between them and the State to allow for such different results. Whether it is the nature of the conduct or activity undertaken, or the differences in its governmental and corporate existance, we need not now explore. Those substantive differences permit of different remedies and defenses."

Krause v. The State of Ohio, 31 Ohio St. 2d. 132, 146, (1972) appeal to the United States Sup. Ct. Dismissed for want of a substantial federal question, 409 U.S. 1052 (1972); Petition for Rehearing Denied 410 U.S. 918 (1973).

Assuming arguendo that a class of plaintiffs collaterally results from the provisions of the Ohio "Court of Claims Act" (O.R.C. 2743.01 et seq), such a classification does not trammel fundamental personal rights and is not drawn upon inherently suspect distinctions such as race, religion or alienage and therefore the classification does not violate the "reasonable relationship" test expressed in the case of *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). There is no denial of equal protection for the act in question does not permit some to bring an action against political subdivisions but refuse such permission to others. The application is uniform.

The State has a legitimate interest in seeking to protect the fiscal integrity of its political subdivisions. The differences in the tax base and means of obtaining revenue between the State and its political subdivisions alone constitute sufficient rational bases for differentiation in the waiver of liability and consent to suit. States are accorded broad discreation in regulations which further a legitimate State interest, and this is seen as a strictly legislative function. *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) and *McGowan v. Maryland,* 366 U.S. 420 (1961).

The equal protection clause of the fourteenth amendment does not require complete parity in classifications established by statutory scheme. This Court has held that "where rationality is the test, a state does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect." *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 316 (1976). This court has made it clear that States are not limited to an "'all or nothing" approach, since the equal protection clause does not require states to "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams,* 397 U.S. 471, 485 (1970).

It is clear from *Palmer v. Ohio,* supra, that this court has established that an individual does not have a fundamental constitutional right to sue a State. It follows logically that failure to provide a forum for such an action cannot amount to a denial of due process.

The Constitution of the State of Ohio provides as follows:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law. *Article 1, Section 16 of the Ohio Constitution.*

It has been held that the above quoted provision is "not self-executing;" and statutory authority is required as a prerequisite to the bringing of suits against the State. *Krause v. State,* supra. The required legislation to permit actions against political subdivisions of the State was not enacted by the legislature and in the absence of such legislation no right of action against those political subdivisions exists. Again the failure to provide a forum for the enforcement of non-existent right cannot amount to a denial of due process.

Similar questions to those presented by the case at bar arose in connection with actions under the United States Court of Claims Act and this court dealt with those questions as follows:

> "The Government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and rules of practice to be observed in such suits. It may restrict the jurisdiction of the Court to a consideration of only certain classes of claims against the United States. *McElrath v. U.S.,* 102 U.S. 426, 440 (1880).

No denial of due process exists as a result of a partial waiver of governmental immunity. An expansion of individual rights occurs; however that expansion of rights was not sufficient to create a right in appellant to bring the action which she seeks to bring.

III.

CONCLUSION

Wherefore, Appellees respectfully submit that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellees respectfully move the Court to dismiss this Appeal or in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Ohio.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that six copies of the foregoing Brief was mailed by certified mail, postage prepaid, on this 10th day of March, 1978 addressed to Ambrose H. Lindhorst and Leo J. Breslin, Lindhorst & Dredame, 1200 American Building, Cincinnati, Ohio 45202, Attorneys for Appellants. I further certify that all parties required to be served have been served.

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